IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 493 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL PRAFULBHAI @ BAKULBHAI NATHABHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR NITIN M AMIN for Appellant,
MR PD BHATE, APP, for respondent.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 22/11/2007

ORAL JUDGMENT

The appellant was the original accused who has challenged the judgment and order dated 28th June 1990 passed by the learned Sessions Judge, Sabarkantha at

Himatnagar in Sessions Case No.56/89.

2. Broadly stated, the prosecution case was that the appellant had committed offence punishable under section 363, 366 and 376 of the Indian Penal Code. As per the established norms and the observations of the Apex Court, name of the victim girl would not be mentioned in this judgment. She would, however, be referred to as “the girl”.

3. As per the prosecution, on 10th February 1988 at about 12.30 p.m. the appellant kidnapped the girl who was aged about 15 years and 8 months on the date of the incident. It is the case of the prosecution that the girl was enticed by the appellant on false promise of marrying her. The appellant had thus committed offence punishable under section 363, 366 and 376 of the Indian Penal Code.

4. Pursuant to the complaint lodged in this regard, the police carried out investigation and submitted chargesheet. The case was then committed before the Sessions Court which framed the charge at Ex.3 against the appellant, in which it was alleged, inter alia, that the appellant on 10th February 1988, at about 12.30 in the afternoon kidnapped the minor daughter of Dahyabhai Hirabhai Panchal by taking her out of the custody of her parents by giving false promise of marrying her and thereby committed offence punishable under section 363 and 366 of the Indian Penal Code. It was further alleged that the

appellant also had sexual intercourse with her against her wish and without her consent and thereby committed offence punishable under section 376 of the Indian Penal Code.

5. As per the prosecution, date of birth of the girl was 1.6.72. This, according to the prosecution was borne out from the school records where the girl was studying. A case was also sought to be built to suggest that though the appellant was already married and had a child, by withholding such information and giving false promise to marry, enticed the girl out of the custody of her parents.

6. To establish the charges, the prosecution examined several witnesses, including Dr.Manish Suvera who had examined the girl, the girl herself, parents of the girl and her near relative. The prosecution also examined the PSO who had taken down the complaint as well as the Investigating Officer who had carried out the investigation.

7. In his deposition, Dr.Manish Suvera, PW-1, Ex.6, stated that he had examined the girl. He found no external injuries on her entire body. He found blood-stains on inner thighs and external genitals. Hymn was missing due to sexual intercourse. According to him, the girl was subjected to sexual intercourse in the recent past. In his opinion, she was aged about 16 years which he deduced from x-rays of elbow joints and teeth.

In his cross-examination, the said witness agreed that there was a separate radiology department in the hospital. He admitted that he had not obtained report of the technician before giving his opinion on the age of the girl. He admitted that his assessment of age can be variable upto 2 years on either side and that therefore, the girl may be of age between 14 to 18 years.

8. The girl was examined as PW-2 at Ex.13. In her deposition, she stated that her date of birth is 1st June 1972. She stated that she knew the appellant before the alleged incident. She stated that they used to exchange letters. That the appellant used to persuade her to marry him, but she used to decline stating that she would like to wait for a couple of years before marriage. On 10th February 1988, the appellant had left a message for her that she should meet him at 12 'O clock in the afternoon. She accordingly went to Nava Mandir at 12 'O clock. The appellant was present there with one jeep-car. Thinking that they would be back in a hour, she sat down in the jeep which was driven to Vijapur from where they took a bus to Visnagar and reached the house of one Amrutbhai, who is the friend of the appellant. At that time, she told the appellant that her parents would be waiting and therefore she wanted to go back. The appellant, however, did not agree and the witness did not have money for the bus fare. According to the witness at about 9'O clock at night

at Amrutbhai's house, the appellant forcibly had sexual intercourse with her. They stayed at the house of Amrutbhai for about 7 days, during which time, according to the witness, the appellant had intercourse with her on several occasions. From there they came to Ahmedabad. The appellant, threatened the witness that if she tries to run away he would beat her brother. Eventually, they were traced out and brought to Kubernagar police station. She stated that she never knew that the appellant was married and had one child. He used to promise her to get married and keep her happy.

In her cross-examination, she was shown number of letters which she admitted were written by her in her own hand-writing. These letters were, therefore, exhibited at Ex.15 to 31. She admitted that she had relations with the appellant since about 1½ to 2 years prior to the incident. She was confronted with certain improvement she made over her police statement. She admitted that she used to cook in the house at Visnagar. She admitted that she left from Malpur willingly.

Contents of the letters admittedly written by the girl shall be taken note of at a later stage.

9. Dahyabhai Hirabhai Panchal, father of the girl was examined as PW-3. His deposition was recorded at Ex.32. He stated that birth date of his daughter was not recorded in the Panchayat register.

He stated that birth-date was not noted down anywhere, but hastened to add that he had noted down the same in a note book on the basis of which the same was recorded in the school records.

In his cross-examination, he stated that he had entered his daughter's name in the school when she was 6 years of age. He admitted that birth-date of his daughter was not recorded in the birth and death register. He also did not have the horoscope of his daughter. He stated that his daughter would be approximately of the age of 6 when her name was entered in the school, however, he could not accurately state her age at that time.

10. Pushpaben Dhanabhai, PW-6, mother of the girl deposed at Ex.43. She also stated that the girl was admitted in the school when she was 6 years of age. Her date of birth was 1.6.72. She, however, could not state the source of date of birth.

11. One Jivabhai Motibhai, PW-7 was examined at Ex.44. He is the uncle of the girl who had accompanied the police party when the girl was traced in Ahmedabad. He stated that when they reached the spot, the girl had started crying and requested him to take her away.

12. Somaji Ratnaji Gamit, PW-4, Ex.34, a police constable who was in the police party when the girl was traced, in his deposition stated that when they

reached Ketan Apartment from Kubernagar Police Station, the appellant and the girl was found there and the girl was relaxing there.

13. Mohanji Shanaji, PW-8, who was the PSO and who recorded the complaint was examined at Ex.45.

14. Rasiklal Maganlal, who was the Investigating Officer, was examined at Ex.46. In his cross-examination, he agreed to several suggestions of the defence regarding the significant improvement sought to be made by the girl in her deposition as compared to her statement before the police. He also agreed that he had not inquired with the Circle Inspector of the Talati regarding the date of birth of the girl.

15. Bhanumatiben Upadhyay, PW-5, was examined at Ex.40. She was the principal teacher of Girls School at Malpur where the girl was studying. From the school records, she stated that the girl was admitted in the school on 13.6.75 and as per the school record, her date of birth is 1.6.72. In her cross-examination, she admitted that as per the Government directives, if date of birth of a child was not ascertained, the same would be indicated between 1st and 15th of June. She also admitted that if any parents produce supporting evidence of the date of birth, the same is recorded on approximation.

16. On the basis of the above evidence, learned

advocates appearing for the parties made submissions before me.

17. Learned advocate Shri Amin appearing for the appellant submitted that there was no evidence on record to hold the appellant guilty of the charges. He submitted that there was no reliable evidence regarding the age of the girl and there was every possibility that she was aged 18 years or more.

17.1 It was contended that the evidence on record would suggest that the girl had an affair with the appellant and she is the one who urged the appellant to arrange for eloping. It was further submitted that the date of birth as borne out from the school record was not based on any evidence and the medical evidence regarding the age of the girl was also sketchy.

17.2 It was contended that when the girl was a major and at any rate was a matured girl and able to take her own decision and when she left the house of her parents willingly, it cannot be stated that she was taken out of the custody of the parents. He, therefore, submitted that offence under section 363 of the Indian Penal Code is not made out. He submitted that there was no forcible sexual intercourse and when the girl was well above 16 years, offence under section 376 is also not proved.

17.3 In support of his contention, learned

advocate for the appellant placed reliance on the decision of this Court in **Rameshbhai Pushkardas Sharma v. State of Gujarat,** 1989 (2) GLH (U.J.) 8 in which this Court discarded the date of birth recorded in the school leaving certificate since it was admitted that the date of birth of the prosecutrix was not registered and the father of the prosecutrix did not have anything in writing with regard to the birth date of the girl and for proving the birth date, no certificate was produced before the school authorities. The Court observed that "parents of the prosecutrix are illiterate. Birth date of the prosecutrix is not registered with the Panchayat. There is nothing on record to show as to on what basis the parents of the prosecutrix have stated that the birth date of the prosecutrix was 1.5.73. Except this oral evidence of parents of the prosecutrix there is no other evidence on record to prove the age of the prosecutrix".

17.4 Reliance was also placed on the decision in the case of **State of Gujarat v. Jivanlal Chhotalal Patel**, 1985 GLH 388. In the said decision, a Division Bench of this Court observed that the Investigating agency must understand that every child is also born in some village, taluka town or in a city. Birth and death register is compulsorily required to be kept. Therefore, the mother of the girl was required to be questioned for finding out as to where the girl was born meaning thereby in which village or whether she was born in any hospital.

There may be cases in which birth date might not have been registered. But the question is not whether birth is registered or not, but the question is what the investigating agency has to find out to investigate regarding the age of the girl. In the said case, the Division Bench found that the girl was left alone by the respondent for bringing food and she had an opportunity to shout or to run away. As she was a willing party, she only waited. Under the circumstances, the Court found that the charge was not proved.

17.5 Reliance was placed on a decision of the Apex Court in the case of **Varadarajan v. State of Madras**, AIR 1965 SC 942, wherein the Apex Court observed that there is a distinction between “taking” and “allowing a minor to accompany a person”. The expressions are not synonymous. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian.

18. On the other hand, learned APP Shri Bhate opposed the appeal and submitted that there was voluminous evidence on record to drive home the charge. He submitted that there was proof to establish that the girl was borne on 1.6.72 and therefore, she was aged less than 16 years on the date of the incident. The question of her consent is

therefore of no relevance. He submitted that in any case, the girl was shown to be below 18 years of age and she was enticed from the custody of her parents on false promise of marrying her by the appellant.

19. I have heard the learned advocates appearing for the parties and also taken the evidence on record.

20. In her deposition, the girl clearly stated that she went with the appellant on 10th February on her own free will. In fact, there is voluminous evidence to suggest that the girl had a long standing affair with the appellant. On record, the girl admitted that she had written letters Ex.15 to 31. These letters elaborately describe her feelings for the appellant. She was madly in love with the appellant and at all stages expressed her affection for him. In fact, in letters after letters, she urged the boy to take her away. She, in fact, described herself as his wife. Repeatedly she stated that she cannot live without him. In one such letter, she planned and plotted her escape from her parents house. She told the appellant that for the time being they might not implement the plan of running away on 10th but could do so in the following month. In another letter, she wrote that she wanted to run away with him at 12 'O clock on 10th February 1988. In yet another letter, she told him that if he betrays her, she will not be able to live. She also stated that he should never leave her or else she

might not survive. In another letter, Ex.26, she described the plan for eloping. It is not necessary to mention the contents of all these letters, suffice it to say that there is no iota of doubt in my mind that the girl had deep love and affection for the appellant and the two had a love affair for a long time before 10th February 1988.

21. To decide the appeal, three questions become relevant. Firstly, age of the girl would be crucial to decide the culpability of the appellant under section 376 of the Indian Penal Code since if it is established that she was aged less than 16 years on the date of the incident, her consent for sexual intercourse becomes irrelevant. Second question would be whether she was enticed with a false promise to marry her and thereafter kept in confinement against her wish. Thirdly, it would also be important to find out whether the prosecution had succeeded in establishing that the appellant was already married and had thus given false promise of marriage to the girl.

22. Insofar as the question of age of the girl is concerned, as noted, the prosecution relied on the evidence of Dr.Manish Suvera, PW-1, who opined that the girl was about 16 years of age on the date of the examination. Additionally, the prosecution also relied on the recording of date of birth of the girl as 1.6.72 in the school record.

23. To my mind, neither of the two would conclusively prove the age of the girl on the date of the incident. The doctor himself was candid in his admission that his assessment could be inaccurate by about two years on either side. According to him, therefore, the girl could be anything between 14 to 18 years of age. Additionally, he had given this opinion without the comments of the radiologist. It would, therefore, be unsafe to peg back the age of the girl as 16 years on his evidence alone. Insofar as the school record is concerned, the same cannot be relied upon for several reasons. Firstly, admittedly, there was no contemporaneous evidence to establish the date of birth of the girl as 1.6.72. Parents of the girl admitted that they had no record to indicate this to be the correct date of birth of the girl. The birth of the girl was not recorded in the Government records. Though an attempt was made to show that the same was noted down by the parents in a dairy, there were conflicting versions given by the father and the mother of the girl in this regard. There is yet another strong reason why I find that the date of birth of 1.6.72 emerging from the school record is unsafe to rely upon. As per the school teacher, PW-5, the girl was admitted on 13.6.75 i.e. when she was 3 years of age considering her date of birth as 1.6.72. Father of the girl, PW-3 Ex.32, as well as her mother, PW-6, Ex.43, had stated that the girl was admitted in the school for the first time when she was 6 years of age. If this admission is taken into account, clearly, the date of birth

disclosed by the father before the school authorities at the time of her admission in the school is inaccurate by three years. Accepting the date of birth as 1.6.72 would render the girl only of 3 years at the time of her admission in the school. Her parents, however, firmly stated that she was 6 years when she was admitted in the school for the first time. Thus, there is great deal of inaccuracy in the disclosure of date of birth before the school authorities by her father.

24. Even otherwise, it can be safely seen that the girl was well over 16 years in February 1988. Whether she was 18 or just about 18 years of age is really not that important. Once this is established, it has to be seen whether the appellant had forced the girl against her wish to have sexual intercourse since the question of consent of the girl would become now relevant.

25. The entire evidence on record would clearly show, as already noted, that the girl was not only in deep love with the appellant, but she was the aggressor in so far as the relation between two were concerned. She is the one who conveyed to the appellant that if he ever left her, she would not survive. She not only participated, but actively plotted her disappearance from her parents house. In the deposition also, she clearly stated that she sat in the jeep with the appellant out of her free will. Thereafter, she was taken in a bus to the house of a

friend of the appellant where she was kept for nearly a week, from where she was once again shifted to Ahmedabad. Though she tried to suggest that she was a captive of the appellant, her assertion does not inspire confidence. She had ample opportunity to seek help or shout for help when she was being shifted from place to place. Admittedly, she had not done so. Additionally, she also stated that the appellant had sexual intercourse with her on several occasions. The doctor who examined her did not find any marks of injury on her body nor did she suggest that she resisted any attempts of the appellant.

26. Considering all these aspects of the matter, I do not find that the appellant had either forcibly kept the girl in his confinement nor do I find that there was any force in the sexual intercourse which the two had during their stay together.

27. I agree with the contention of the counsel for the appellant that when the girl was about to cross 18 years of age, if not already crossed the age of 18, was mature enough to understand the implications of her steps and had also studied upto 12th standard, her act of leaving her parents custody out of her own free choice would not amount to the appellant taking her away from the care of her parents as is observed by the Apex Court in the case of Varadarajan (supra).

28. The last question which remains to be

considered is whether the appellant had given any false promise of marriage. There is no iota of evidence on record to establish this aspect. As noted, in fact, it was the girl who had repeatedly showed her desire to marry the appellant. Nothing has been produced to suggest that the appellant was already married or that the girl did not know about the same.

29. Under the circumstances, I find that the court below erred in recording the finding of guilt of the appellant for offence punishable under sections 363, 366 and 376 of the Indian Penal Code.

30. Under the circumstances, the appeal succeeds. The impugned judgment and order is aside. The appellant is acquitted. Bail bond stands canceled. Fine if already paid shall be refunded to the appellant.

(Akil Kureshi, J.)

(vjn)